

ASIAN DEVELOPMENT BANK ADMINISTRATIVE TRIBUNAL

Decision No. 114

(21 July 2018)

Mr. I

v.

Asian Development Bank

Lakshmi Swaminathan, President

Gillian Triggs, Vice-President

Shin-ichi Ago

Anne Trebilcock

Chris de Cooker

1. The Applicant, an International Staff member, challenges the decision of the Asian Development Bank (“the Respondent”, “the ADB” or “the Bank”) to terminate his employment under the 2016 Early Separation Program (“the ESP” or “the program”). The Applicant contests the 28 August 2017 decision of the President of the ADB to accept the recommendation of the Appeals Committee to terminate his appointment “in the interest of good administration,” in accordance with Administrative Order (AO) 2.05 (“Termination Policy”) paragraph (“para.”) 8.1.

I. THE FACTS

Background

2. The Applicant joined the ADB on 21 September 2007 as a Procurement Specialist (International Staff Level 4) in the Central Operation Services Office (COSO). He was promoted to Senior Procurement Specialist (International Staff Level 5) within 3 years. Again, he was promoted on mission to Project Administration Unit (PAU) Head (International Staff Level 6) for portfolio management in a regional department that shall be referred to as “Department 1”. In March 2016 he was laterally transferred to Department 1 Director General’s Office (or front office) as a Principal Infrastructure Specialist (PIS), the position he held till his service was terminated.

2016 Early Separation Program (ESP)

3. In August 2016, the Respondent launched the ESP to support the Bank's staffing optimization efforts. The President of the ADB approved the implementation of the 2016 ESP after several months of planning and preparation, including consultations with the Human Resources Committee of the Board of Directors and the Staff Council. A memorandum dated 3 August 2016 from the Director General, Budget, Personnel and Management Systems Department ("DG, BPMSD") through the Vice President, Administration and Corporate Management (VPAC) to the President explained that the 2014 Mid Term Review (MTR) of Strategy 2020 stressed the need to align staffing levels and skills with the changing business needs of the Bank's client countries. The MTR Action Plan identified seven Sector Groups ("SGs") and seven Thematic Groups ("TGs") as an indicator of skills required. To further these goals, it was decided to implement a management-driven, non-voluntary separation program in the "interest of good administration" under the provisions of paragraph 8 of AO 2.05. The objectives of the ESP were to "facilitate the separation of staff, whose contribution to ADB has become limited or diminishing and/or who are experiencing career stagnation, with dignity and with fair and reasonable compensation." The legal framework of a termination in the interest of good administration is different from that of termination for unsatisfactory service or a termination for misconduct, the latter two being related to a fault of the staff.

4. Appendix 2 of the Memorandum dated 3 August 2016, titled "Interest of Good Administration" ("IGA"), explains this concept. Paragraph 3 provides that in short, the termination of a staff member's appointment "in the interest of good administration" means that the President has made a determination that such termination is necessary or appropriate in furtherance of the goals and interests of ADB in the circumstances and contexts in which ADB operates. Paragraph 15 further provides that good administration "*also embodies the concept of fairness in substance and in processes, and requires that the ESP is designed and implemented fairly. The assessments, determinations and decisions will be derived from fair and appropriate processes ...*" which are set forth in the Guidelines for the Implementation of the 2016 ESP.

5. The ESP Guidelines for the implementation of the 2016 ESP were issued on 8 August 2016. Under the ESP Guidelines, the staff being considered for inclusion in the program must first meet all of the following general criteria, namely:

- a) be an active staff member who is on regular appointment;
- b) who has served a minimum of 5 years' service; and
- c) who has not received an "unsatisfactory" rating in the recent performance review.

6. The program was not to be used as a substitute for dealing with unsatisfactory performance or for addressing poor performing staff outside the normal performance review process. In addition to the general criteria described above, identification and selection of staff for separation under the ESP had to meet one or more of the following key criteria:

- (i) Skills mismatch - staff whose skills do not meet the current and/or evolving requirement of ADB in either technical or managerial capacity, and are thereby incapable of performing or producing outputs expected by ADB. Such staff may have demonstrated satisfactory performance in preceding years, but relevance of their skills and/or experience is diminishing due to the changing nature of ADB's current and future operational needs.
- (ii) Stagnation - staff who have stagnated in their professional development and ability to contribute to the mission of ADB in the circumstances in which it now operates and who have limited potential for career growth, with poor prospects to move jobs upward or laterally. Limited potential can also be due to demonstrated lack of willingness to take on greater responsibilities based on the requirements and expectations of the position level and demands.
- (iii) Lack of mobility - staff who do not want to move to other positions and do not accept reassignments when offered, or efforts to reassign staff proved unsuccessful despite the ADB's efforts to move them.

7. The ESP Guidelines included detailed Implementation Procedures as follows:

- a) Heads of Departments (“HODs”), in consultation with their directors, will identify staff to be considered for inclusion in the program based on the selection criteria.
- b) HODs submit recommendations to the Review Panel.
- c) A Review Panel considers each case for inclusion in the 2016 ESP against the criteria. The Review Panel may reject staff recommended by HODs if it considers that the criteria have not been met. The Review Panel may also request HODs to amend the written case for inclusion of staff in the 2016 ESP for those staff that the Review Panel considers as meeting the criteria. The Review Panel endorses the list of identified staff.
- d) Once endorsed by the Review Panel, BPMSD provides the names of staff endorsed by the Review Panel together with the written case for inclusion in the 2016 ESP, as approved by the Review Panel, to the respective HODs or VPs (in case a head of department or office is included in the list).
- e) HODs (or concerned VP for head of department/office) accompanied by BPMSD (respective Business Partners) inform the staff that he/she has been identified for separation following the IGA provision with the option to resign voluntarily. A written notice is also provided to staff. Staff will have up to 21 calendar days to comment or submit his/her resignation.
- f) If staff resign, he/she will sign a mutually agreed separation with accompanying estimated termination payments. The staff member’s last reporting day should not be later than 30 calendar days from the date of notification of resignation.
- g) The Review Panel will review the case of each identified staff who has not resigned within the 21 calendar days referred to above and consider their comments, if any. If the Review Panel confirms that the staff member will be included in the 2016 ESP, a recommendation for termination of his or her appointment in the interest of good administration will be submitted (i) to the

President for International Staff and (ii) to DG, BPMSD for National Staff/Administrative Staff (NS/AS).

- h) BPMSD provides to staff whose employment is terminated in the interest of good administration a copy of the termination memorandum approved by the President for International Staff or DG, BPMSD for NS/AS, which includes an estimated termination payment. The staff member's last reporting day will be the date of receipt of the termination memorandum. After this day, the staff member may continue to access to his/her work station for the next 15 calendar days.
- i) BPMSD initiates the exit clearance procedures for staff.

8. The Review Panel for International Staff comprised (i) the Vice-President, VPAC (as Chair); (ii) two other Vice-Presidents (including the concerned Vice-President); (iii) the concerned HOD; and (iv) the Director General of BPMSD. For those affected staff who chose not to resign voluntarily and contest the recommendation, the Review Panel, comprised of exactly the same members, reconvened to review the case.

9. There was also a provision in the ESP package that those selected for the 2016 ESP would receive compensation, including a 90 days' notice period and a termination payment equal to one months' salary for each year of service up to a maximum of 12 months. The identified staff was also given the option to resign voluntarily from the Bank, in which case additional payments were made.

10. The President's 9 August 2016 Memorandum to the Board of Directors stipulated, "[t]here are no targets or quotas per department or office" and "*[all] assessments, determinations and decisions under the ESP will be based on clear criteria and procedures, and only staff who meet the criteria are to be included. The process includes several layers of review. These steps are important to establish confidence in the integrity of the process as well as from a legal standpoint and to maintain the trust of the majority of staff who are not affected by the ESP*". (emphasis added)

11. On 8 August 2016, VPAC issued a memo announcing the launch of the program and explaining that the objective of the ESP was to “*support ADB’s staffing optimization efforts to rebalance the work load and address skills needs through early separation of staff with limited and diminishing contributions and/or lack of potential career growth.*” The ESP was given wide publicity, for example, in the Frequently Asked Questions (FAQs) and publications like the “ADB Today”. The ESP was implemented from August to December 2016. In all, 90 staff at various levels, international, national and administrative, including the Applicant, were terminated. Of those, 88 chose to resign while the remaining two, including the Applicant, chose to contest their inclusion through the Bank’s internal justice system and then filing of an Application in the Tribunal.

Applicant’s Career Prior to Identification for Termination through the ESP

12. The Applicant had in the past raised various HR issues with BPMSD. Most of these had been resolved years earlier except for one issue relating to the Applicant’s alleged lack of a work program for the position he held immediately before he was identified for inclusion in the ESP.

Termination of Applicant’s Appointment

13. In accordance with the procedures laid down in the ESP Guidelines, DG, Department 1 on 28 September 2016, recommended the inclusion of the Applicant’s name in the ESP.

14. DG, Department 1 provided the following justification in the 28 September 2016 ESP Form, according to the three selection criteria (only one was required):

Skills mismatch: “Staff joined [Department 1] more than three years ago as Project Administration Unit (PAU) Head in [an overseas mission], and returned to [Department 1] in early 2016. [The Applicant] is a contract manager who is knowledgeable about procurement based on his extensive experience prior to ADB working for engineering firms. He applied his technical knowledge and experience in procurement to manage contracts during the initial years of his posting in [an overseas mission]. Over time, however, his ability to apply this knowledge to the unique procurement challenges in the [overseas region] has shown clear limitations. In particular, during his tenure in [an overseas mission], his narrow contract

management skills limited his ability to manage a broader range of portfolio management challenges in a small country office. This skills mismatch has affected the staff's overall ability and success in advancing his career.”

Career stagnation: “Options for how and where [the Applicant] can be assigned and advance his career are constrained by his limited capacity to expand his responsibilities beyond contract management to encompass a wider set of responsibilities involving procurement and portfolio administration. These limitations have also restricted [Department 1's] ability to delegate certain assignments to staff.”

Lack of Mobility: “Staff has unsuccessfully applied for 9 positions within ADB since his return from [an overseas mission]. For the positions he applied, staff was not invited to interview.”

Review Panel

15. In accordance with the ESP Implementation Guidelines, DG, Department 1's recommendation was reviewed by a Review Panel. Members of the Review Panel were: VPAC; VP, Operations 2; VP, Knowledge Management and Sustainable Development; DG, Department 1; and DG, BPMSD with Senior Advisor, Office of the DG, BPMSD (“BPOD”) in attendance as Secretary. The Review Panel endorsed the recommendation on the same day, 28 September 2016.

16. On 11 October 2016, following a meeting with the Principal Human Resource Specialist and DG, Department 1, the Applicant was notified of his identification for inclusion in the ESP. The Applicant was sent a detailed note of the meeting, told details of the termination payment he could expect to receive, and given the option of either contesting the decision or resigning.

17. On 18 October 2016 the Applicant contested the decision through a written submission to DG, BPMSD that included objections to each of the criteria used to justify his inclusion in the ESP and added allegations of bullying, harassment and integrity (“BHI”).

18. On 5 December 2016, the same members of the Review Panel, in accordance with the ESP Guidelines, reconvened to review the Applicant's case and consider his comments. The Review Panel noted that the Applicant had raised the issue of BHI violations in a meeting with

Director, BPHP on 15 March 2016, that he had been informed of his rights under AO 2.11 (“Prevention of Harassment”), and that he was duty bound to report integrity violations under AO 2.10 (“Whistleblower and Witness Protection”). The Panel also observed that the Applicant had not pursued any of his complaints formally with BPMSD or the Office of Anticorruption and Integrity (OAI). Following the meeting, the Review Panel did not change its earlier conclusion that the Applicant fell within the criteria for inclusion in the 2016 ESP and confirmed the recommendation made by DG, Department 1, to terminate his employment in the interest of good administration.

19. On 9 December 2016 DG, BPMSD requested the approval of the President to terminate the Applicant’s appointment based on the confirmation of the Review Panel. On 13 December 2016 the President approved the Applicant’s termination of employment and the Applicant was issued a notice of termination on 14 December 2016.

20. In terms of the ESP, the Applicant had received a termination payment (lump sum) corresponding to 9.62 months of salary plus payment for 90 days and other benefits to which he was entitled for his accrued service and resettlement benefits. His last date of employment was 4 May 2017. The Tribunal notes that the Applicant has not contested the calculation of the termination payment under the ESP.

Exhaustion of Internal Grievance Procedures

21. On 25 January 2017, the Applicant submitted a request for compulsory conciliation which ended without settlement on 25 March 2017. The Applicant requested Administrative Review on 10 April 2017 and was advised on 25 April 2017 of the decision to deny the request.

22. On 5 May 2017 the Applicant filed an appeal with the Appeals Committee which was resubmitted on 25 May 2017. Amongst several statements made, the Applicant alleged that principles of fairness, transparency and impartiality had not been followed.

23. The Appeals Committee has competence pursuant to AO 2.06 (“Administrative Review and Appeals Procedures”), para. 9.2(d) to determine “*whether the decision constitutes abuse of discretion, arbitrariness, discrimination, improper motivation, or violation of fair and reasonable procedure.*” In its Report dated 14 August 2017, the Appeals Committee recommended that the President reject the Applicant’s appeal and found “*no action by the Respondent that can be considered as an abuse of discretion, arbitrariness, improper motivation, discrimination or a violation of fair and reasonable procedures.*”

24. In its finding, the Appeals Committee noted that the “*ADB is bestowed with a higher degree of discretion based on its responsible judgement of what is ‘in the interest of the good administration of the Bank...’ This higher degree of discretion is also supported by a more substantial termination payment provided to the staff member which is not applicable to other types of termination.*”

25. The Appeals Committee noted that it believed that the “lack of mobility” criteria did “*not apply to the [Applicant] given that his applications manifest his clear willingness to move to other positions in the ADB.*” However, given that the ESP Guidelines require only one of the three specific criteria to be met, the Committee did not believe there was any issue with the overall conclusion of the ESP evaluation.

26. The Committee concluded that the procedures set forth in the ESP Guidelines were properly followed, and it “*did not find evidence to establish that the Review Panel lacked fairness, transparency and impartiality.*” It concluded in its 14 August 2017 memorandum to the President that “*ADB’s relevant regulations, AOs, policies and procedures have been applied correctly.*”

27. On 28 August 2017, the President, following the recommendation of the Appeals Committee, rejected the Applicant’s appeal. The Applicant was notified of this decision on 15 September 2017.

28. The Applicant first filed his Application in the Administrative Tribunal on 14 November 2017 and later on 27 November 2017, and the Application was received in the Tribunal on 4 December 2017. The Answer was filed on 6 February 2018, the Reply on 13 March 2018 and the Rejoinder on 16 April 2018.

Civil Action Filed in a National Court

29. Meanwhile, on 5 June 2017, one month and one day after his last date of employment, the Applicant sent a letter to the Bank threatening to take legal action in a national court against the President and members of the Review Panel in connection with Applicant's termination of employment. Those named were accused of various criminal acts, including defamation and corruption, under the Criminal Code and Civil Code of Indonesia. The legal notice of accusations was copied to several institutions including the Indonesian Minister of Finance, the House of Representatives of Indonesia, and various embassies in Indonesia.

30. The Respondent replied to the Applicant's letter on 19 June 2017 explaining the immunities enjoyed by its staff under its Charter and the internal dispute mechanisms available. Despite this, on 4 July 2017 the Applicant wrote again to the Bank with the same threat and on 2 January 2018, while this Application was pending before the Tribunal, the Applicant commenced a civil action against the "Asian Development Bank in this case represented by its Senior Management" before the First Court of Central Jakarta. As part of his plea, the Applicant requested the court to punish the Respondent by ordering it to pay him USD 1,000,000,000 (One Billion US Dollars) and to pay all court fees and costs.

Relief Requested

31. The Applicant submits that based on the contentions given in the Application he should be granted the following relief:

- a) A declaration that the Decision terminating the Applicant's employment is rescinded, null and void.

- b) Reinstate Applicant's eligibility for consulting services for engagement by ADB as technical assistance, staff and training consultant and as resource person.
- c) Compensate the Applicant with payment of salary and benefits until the retirement age of 60 years with annual increase of 3-5%.
- d) Public apologies by the President of ADB in the international media and in ADB Intranet or MyADB Portal. The content, length and duration of the publications shall be approved and endorsed by the Applicant.

II. SUMMARY OF THE PARTIES' CONTENTIONS

Applicant's Position

32. The Applicant asserts that the Respondent has committed a conflict of interest by abusing its discretion, office and authority. He contends that the ESP Review Panel committed misconduct, integrity violations, fraud and collusion as well as violated Staff Regulations and Administrative Orders, including the ESP Guidelines, in recommending his name for termination under the ESP. The "Respondent's ESP Panel members had evaluated their own work that was prepared by DG, BPMSD and completed by DG, [Department 1]" because the latter two officers were members of the Review Panel. He asserts that those officers should have declared their conflict of interest and recused themselves.

33. The Applicant asserts that the decision is an abuse of discretion as he did not meet the three specific criteria for selection and the Respondent has failed to meet its burden of proof by not supporting all its allegations with facts. He contends that he has been incorrectly assessed as a "contract manager" rather than a Principal Infrastructure Specialist; that his skills, which match three of the seven SGs and one of the seven TGs, have not been taken into account; that his regular promotions at around three-year intervals are evidence his career was not stagnating; and that his job applications were evidence of his mobility. He also asserts he has been subjected to discriminatory and retaliatory treatment because he had questioned unfair practices by BPMSD, and that proper procedures based on the ESP Guidelines and the Code of Conduct were not followed.

Respondent's Position

34. The Respondent asserts that it has the legal authority under AO 2.05, para. 8 to terminate the appointment of staff in the interest of good administration, the ESP established comprehensive, fair and transparent processes for determining which staff might be affected by the ESP, and the Applicant was selected fairly and properly in accordance with the ESP Guidelines. It submits that there was no conflict of interest as DG, BPMSD and DG, Department 1 both performed their roles as Review Panel members in accordance with paragraphs 9(a) and 9(b) of the ESP Guidelines. It also asserts that it was “entirely appropriate” that DG, Department 1 was a member of the Review Panel that reviewed whether the Applicant met the criteria for the ESP because no other member of the panel had direct knowledge and visibility on the work of the Applicant. The Review Panel had twice endorsed the assessment of DG, Department 1, taking into account the comments of the Applicant contesting his inclusion in the ESP, and had concurred with the assessment of DG, Department 1. The Respondent also notes that the Review Panel included, in addition to DG, BPMSD and DG, Department 1, three Vice Presidents VPAC, Vice President Operations 2 and Vice President Knowledge Management and Sustainable Development. They had a broader view than the Applicant of the goals and interests of the Respondent and the skills required for the Respondent to respond to meet those goals.

35. While the Respondent notes that the Applicant was recognized as having “extensive experience”, his skills did not match the Bank’s evolving requirements. The Respondent argues that in describing him as a “contract manager” it was referring to his skills rather than his official title. The Respondent also argues that the Applicant’s career had stagnated, with poor prospects to move jobs upwards or laterally. While the Appeals Committee did not agree with his HOD that the Applicant’s unsuccessful applications for positions indicated lack of mobility, the Appeals Committee agreed that the Applicant met two of the other specific criteria where only one was required for inclusion in the ESP. Furthermore, the Respondent notes that the Applicant’s views on burden of proof are inconsistent with the common rule that the Applicant must carry the burden of showing that the managerial decision was vitiated by arbitrariness or disregard for due process.

36. The Respondent also asserts there was no discrimination or retaliation against the Applicant. The procedure was the same for all staff and the Applicant was not treated differently. With regard to the retaliation allegations, the Respondent notes that many of the exchanges with BPMSD were years earlier and had been resolved. It notes that these concerns of the Applicant had been specifically addressed in the second meeting of the Review Panel of 5 December 2016. Furthermore, the Respondent denies that the members of the Review Panel, which included three of the six Vice Presidents of the Bank, would have “plotted to misuse” the ESP as a means to retaliate against the Applicant.

37. Lastly, the Respondent submits that the Applicant comes to the Tribunal with “unclean hands” as he repeatedly threatened to bring criminal and civil actions before the national courts of Indonesia against the President and members of the Review Panel. Despite advice by the Respondent, the Applicant thereafter commenced civil action against the ADB (represented by its senior management) before the First Court of Central Jakarta. Respondent asserts this is inconsistent with the conditions of the Applicant’s appointment, including post-termination, to not go outside the Bank’s internal grievance system (AO 2.02 (“Personnel Policy Statement and Duties, Rights and Responsibilities of Staff Members”), para. 4.11). The Respondent states that the Applicant’s filing of the civil action in a national court was in clear violation of his duties and obligations and is a threat to the Respondent’s Charter-based immunities from the legal processes of member countries. Hence, they have contended that the Applicant has come to the Tribunal with “unclean hands” and he should be denied any form of equitable compensation or relief.

III. FINDINGS

Preliminary matters

Oral Proceedings

38. The Applicant has requested an oral hearing, which the Respondent said was not required.

39. Under Article VIII of the Tribunal's Statute, oral proceedings shall be held only when the Tribunal so decides. In this case, the Applicant and Respondent have supported their positions with sufficient documents and there seems to be no need for further oral clarifications. Besides, the Applicant has not indicated the names of any witnesses whom he would like to examine orally. In the circumstances, after due deliberation, the Tribunal does not find it necessary to order an oral hearing in this case. (See *Claus*, ADBAT Decision No.105 (3 February 2015))

Confidentiality

40. In accordance with Practice Direction No. 3 (19 August 2005) of the Tribunal's Rules of Procedure, the Applicant has requested that his and all other names mentioned in his Application should be kept confidential in the publication of the decision. The Respondent has not made any submission on this point. In the circumstances, the Tribunal decides to grant confidentiality.

En Banc Decision

41. The case involves the interpretation of the 2016 ESP provisions, which warrants the case being decided *en banc* under Article V (5) of the Tribunal's Statute read with Rule 5A of the Tribunal's Rules of Procedure.

The Merits

42. The Tribunal has set out its scope of review with respect to termination decisions in the following terms:

“The Tribunal's scope of review of this Application, which involves a managerial decision, is to “say that the decision has or has not been reached by the proper processes, or that the decision either is or is not arbitrary, discriminatory, or improperly motivated, or that it is one that could or could not reasonably have been taken on the basis of facts accurately gathered and properly weighed” (*Lindsey*

Decision No. 1[1991], 1 ADBAT Reports 5, para.12). The Tribunal is to examine allegations of non-observance of the Applicant's contract of employment, which includes the applicable rules of the Bank (Article II, para. 1 of the Statute of the Tribunal). The Tribunal's role is not to substitute its views for managerial decision properly taken". (*Ms. G (No.2)*, Decision No. 107 (19 August 2016), para. 65).

See also *Mr E.*, ADBAT Decision No.103 (12 February 2014), para. 54; *Haider*, Decision No. 43 [1999], V ADBAT Reports 6, para. 18; and *Breckner*, Decision No. 25 [1997], III ADBAT Reports 17.

43. In addition, it is well established that the "burden of proof rests on the person who makes allegations." (*Ms. G*, ADBAT Decision No. 106 [23 September 2015], para. 36).

44. The primary issues posed in this case are:

- (i) Did the termination of employment in the interests of good administration follow due process?
- (ii) Was the decision arbitrary or an abuse of discretion?
- (iii) Was the decision tainted by discrimination or retaliation?

Issue 1. Did the termination of employment in the interests of good administration follow due process?

45. The salient facts regarding the procedures that have been followed by the Respondent in this case have been mentioned in paragraphs 13 - 20 above. Having regard to the relevant facts and the detailed procedures laid down in the Guidelines for the Implementation of the 2016 ESP, the Tribunal is satisfied that the procedures have been adhered to by the Respondent in terminating the services of the Applicant under the 2016 ESP. However, the important question arises whether the Respondent's use of the ESP Review Panel for review meets the requirements of due process.

46. Applicant alleges that “Respondent had committed a conflict of interest by abusing its discretion, office and authority”. He states that DG, BPMSD was the ESP Panel member who had provided the documents for the Panel. DG, Department 1, who had completed the ESP evaluation and made the recommendation, was another member of the Panel. Applicant contends that “Respondent’s ESP Panel had evaluated their own work that was prepared by DG, BPMSD and completed by DG, [Department 1]”. He further alleges that DG, Department 1 and DG, BPMSD had failed to disclose their real or perceived conflict of interest in the ESP Minutes dated 28 September and 5 December 2016.

47. The Respondent states that there is no “conflict of interest” in the duties performed by DG, BPMSD and DG, Department 1, who both performed their roles as Review Panel Members in implementing the procedures prescribed in paragraphs 9 (a) and (b) of the ESP Guidelines. The Head of Department of the Applicant had to identify the staff to be considered for inclusion in the program. Respondent has submitted that neither DG, BPMSD nor DG, Department 1 have acted in their personal capacity when they performed their duties in evaluating the inclusion of the Applicant in the 2016 program for early separation.

48. The Bank’s AO 2.02, para. 2.14 specifically stipulates its obligation in relation to involuntary separation as being to:

“observe due process in all areas of personnel administration, in particular, in initiating and deciding on the involuntary or premature separation of staff from service. ...” (emphasis supplied)

The Tribunal also recalls the President’s 9 August 2016 memorandum to the Board of Directors recognised that the layers of review were *“important to establish confidence in the integrity of the process as well as from a legal standpoint ...”*.

49. The Tribunal notes that the Review Panel served its purpose during its first review. The members of the Review Panel were in a position to assess the goals and interests of the Respondent and what skills were required by management to achieve those goals, rather than

what the Applicant himself thought of his abilities and skills. It may also be added that the assessment made by the Applicant of his own ability and competence in a particular job cannot be taken as the yardstick of the requirement of the management. The decision of the Review Panel on its first review of the recommendation cannot, therefore, be considered an abuse of managerial authority.

50. However, the Tribunal notes that when the recommendation was contested by the Applicant and reviewed a second time by the same members of the Review Panel that included at least two officers (DG, Department 1, DG, BPMSD) with highly influential views on the Applicant and a prior interest, it was reduced essentially to a rubber stamp. On contesting the earlier recommendation, the Applicant had a right for that recommendation to be reviewed by an impartial body in accordance with AO 2.02, para. 2.14, and it should have been considered by different people.

51. A critical feature of due process is impartiality of any decision-making body, particularly in view of the provisions of AO 2.02, para. 2.14. The Appeals Committee had the opportunity to consider the impartiality of the Review Panel, but failed to do so. Although the Appeals Committee said it addressed the allegation of impartiality of the Review Panel, it restricted its review to whether or not “ADB’s relevant regulations, AOs, policies and procedures have been correctly applied” and did not address the broader structural (member composition) problem of the review itself. It failed to consider that the Review Panel was comprised of exactly the same members, so its conclusions did not cure the earlier composition defect in proceedings. Although the Tribunal does not require an altogether different composition, the membership of the Review Panel for its second meeting should not have included all of the same members and in particular, should not have included the officer who made the initial recommendation to include the Applicant in the ESP.

52. Therefore, after reviewing the record, the Tribunal concludes that the second review by the same members of the Review Panel did not meet the Bank’s own requirements of “confidence in the integrity of the process” and in particular, the broad requirements of due process.

53. The Applicant being successful on this plea, the Tribunal finds it unnecessary to consider the remaining issues of alleged abuse of discretion and discrimination.

IV. RELIEF

54. Regarding the filing of a civil action against the Bank in the national courts of Indonesia, the Tribunal reiterates its findings in *Drilon*, ADBAT Decision No. 110 (6 May 2017), para. 74 that such action is “*incompatible with the system of internal review which is linked to the immunities from jurisdiction enjoyed by the ADB*” pursuant to its agreement with member States as provided in Article 55(i) of the Agreement Establishing the ADB. The Tribunal notes that this action constituted serious misconduct as contemplated by AO 2.04 (“Disciplinary Measures and Procedures”) and breached AO 2.02, para. 4.11, which precludes Applicant from pursuing employment-related grievances in a national legal system. Moreover, the Tribunal strongly disapproves of such action when an Applicant has an application pending before the Tribunal.

55. The Tribunal also notes that when the Applicant wrote to the ADB on 5 June 2017 accusing the members of the Review Panel of criminal acts and threatening to take legal action, he copied it to several other national Governments via their embassies. This contradicted the terms of his appointment with the Bank as an international civil servant, and damaged the reputation of the Respondent. This Tribunal has exclusive jurisdiction to settle matters involving alleged non-observance of staff members’ terms of employment. For these reasons, the Tribunal has decided to take the Applicant’s actions into account in deciding on relief.

Conclusions

56. The Application partly succeeds to the extent mentioned below.

DECISION

For the above reasons, the Tribunal unanimously decides that:

1. The 28 August 2017 decision of the President is rescinded;
2. The Applicant shall be reinstated to his position and be made whole for all lost earnings minus the separation package he received, with the Bank to pay interest at the rate of 6% per annum;
3. Pursuant to Article X, paragraph 1 of the Statute of the Tribunal, should the President of the Bank decide that the Applicant shall be compensated without further action being taken in the case, the Tribunal fixes the amount of compensation to be paid to the Applicant at US\$1,000;

Taking into account that the Applicant was self-represented, to award costs in the amount of US\$500; and

4. All other claims for relief are denied.

Lakshmi Swaminathan

/s/
President

Gillian Triggs

/s/
Vice President

Shin-ichi Ago

/s/
Member

Anne Trebilcock

/s/
Member

Chris de Cooker

/s/
Member

Attest:

Cesar L. Villanueva

/s/
Executive Secretary

At Asian Development Bank Headquarters, 21 July 2018